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In the Supreme Court of the United States

OCTOBER TERM, 1990

THOMAS BRAXTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a defendant's agreement to a statement of facts that establishes all the elements of a more serious offense than the offense of conviction is a "stipulation that specifically establishes" the more serious offense within the meaning of Sentencing Guideline 1B1.2.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. 1-8, is reported at 903 F.2d 292.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1990. The petition for a writ of certiorari was filed on August 3, 1990, and was granted on November 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND RULES INVOLVED

18 U.S.C. 3553 provides, in pertinent part:

> (a) *Factors to be considered in imposing a sentence.* The court shall impose a sentence suf-

ficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;

Sentencing Guideline 1B1.2 provides, in pertinent part:

1B1.2. *Applicable Guidelines.*

(a) Determine the offense guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction (*i.e.*, the offense conduct charged in the count of the indictment or information of which the defendant was convicted). *Provided*, however, in the case of conviction by a plea of guilty or *nolo contendere* containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section in Chapter Two most applicable to the stipulated offense.

(b) After determining the appropriate offense guideline section pursuant to subsection (a) of this section, determine the applicable guideline range in accordance with § 1B1.3 (Relevant Conduct).

(c) A conviction by a plea of guilty or *nolo contendere* containing a stipulation that specifically establishes the commission of additional offense(s) shall be treated as if the defendant had been convicted of additional count(s) charging those offense(s).

Sentencing Guideline 6B1.4 provides, in pertinent part:

6B1.4. *Stipulations* (Policy Statement)

(a) A plea agreement may be accompanied by a written stipulation of facts relevant to sentencing. Except to the extent that a party may be privileged not to disclose certain information, stipulations shall:

> (1) set forth the relevant facts and circumstances of the actual offense conduct and offender characteristics;
>
> (2) not contain misleading facts; and
>
> (3) set forth with meaningful specificity the reason why the sentencing range resulting from the proposed agreement is appropriate.

(b) To the extent that the parties disagree about any facts relevant to sentencing, the stipulation shall identify the facts that are in dispute.

(c) A district court may, by local rule, identify categories of cases for which the parties are authorized to make the required stipulation orally, on the record, at the time the plea agreement is offered.

(d) The court is not bound by the stipulation, but may with the aid of the presentence report, determine the facts relevant to sentencing.

STATEMENT

Petitioner was indicted in the United States District Court for the District of Maryland on one count of attempting to murder a federal officer, in violation of 18 U.S.C. 1114; one count of assaulting a federal officer, in violation of 18 U.S.C. 111; and one count of using a firearm in the commission of a crime of violence, in violation of 18 U.S.C. 924(c). J.A. 2-3. Petitioner entered a plea of not guilty to the at-

tempted murder count, and pleas of guilty to the assault and firearms counts. *Id.* at 5. The district court sentenced him to consecutive terms of 63 months' imprisonment on the assault count and 60 months' imprisonment on the firearms count, to be followed by a three-year term of supervised release. *Id.* at 82-83.

1. The facts underlying petitioner's convictions are not in dispute. At the plea hearing, the government stated that, if the case went to trial, it was prepared to prove that the following events occurred. J.A. 16-18.

Petitioner was committed to St. Elizabeth's Hospital in the District of Columbia in September 1974, when he was found not guilty by reason of insanity after being charged with bank robbery. He was subsequently discharged from the hospital on conditional release status, but was still required to report regularly to the outpatient department. At one point, he sought to be released from his reporting obligation, but his request was denied. When he subsequently failed to report for outpatient treatment as required, a warrant was issued for his arrest. J.A. 36.

On June 10, 1988, after learning that petitioner was living in Mt. Rainier, Maryland, four deputy United States marshals went to petitioner's apartment and knocked on the door. Although no one answered the door, the marshals could hear movement in the apartment. They knocked again, identified themselves, and still received no response. The marshals then unlocked the door with a key supplied by the landlord, knocked again, identified themselves, and announced their purpose. A security chain barred their entry into the apartment. As one of the marshals kicked the door open, petitioner fired a shot through the door opening in the direction of the marshals. The bullet embedded itself in the door just above the doorknob and the door snapped shut. J.A. 16-17.

After a short pause, the marshals again announced their presence and kicked open the door. At that point, petitioner fired another shot through the doorway. That bullet lodged in the door about five feet above the floor. The marshals then withdrew and took cover. J.A. 17-18. Petitioner told the marshals that he was not coming out, that he did not want to go back to the hospital, and that if the marshals came inside he would "kill them or blow their head[s] off." *Id.* at 18.

The marshals called for reinforcements, and the local police crisis intervention team arrived and took over. The area was barricaded and nearby buildings were evacuated. When the crisis intervention team asked petitioner to leave the apartment, he said he was not coming out and added, "I want you to come in and get me. I want to kill you." J.A. 18. Petitioner fired two more shots before he was eventually subdued with tear gas and arrested. A .38 caliber revolver was seized from petitioner at the time of his arrest. After his arrest, petitioner stated that he knew the men knocking on the door were United States marshals, but that he fired at them because he did not want to return to the hospital. *Id.* at 17-18.

2. Petitioner agreed with the government's statement of the facts, with two exceptions. First, petitioner recalled that he fired the first two shots at the same time. Second, petitioner stated that the gun was not on his person when he was arrested, but was found inside his apartment. J.A. 19. The government agreed that the gun was found in the apart-

ment, but noted that petitioner was the only person in the apartment at the time he was arrested. With those corrections, petitioner's counsel said that the government's statement of facts was "accurate." The district court asked petitioner: "[I]s that what happened?" Petitioner responded in the affirmative. *Ibid.*

Petitioner entered pleas of guilty to the assault and firearms counts. His counsel explained that petitioner did not have a formal agreement with the prosecutor to dismiss the attempted murder count, J.A. 5, but that counsel "did discuss the possibility that at sentencing the Government may well be induced to drop the remaining count," *id.* at 13. The prosecutor agreed that although there was no formal plea agreement, she had told defense counsel that the government would reassess the case and, if appropriate, dismiss the attempted murder count after sentencing. *Ibid.* The court then explained to petitioner that the government retained the option to pursue or dismiss that count at or after the time of sentencing. As the court put it, addressing the prosecutor, "I guess, frankly, it comes down to the fact that [if] you're satisfied with whatever sentence I impose, then you may evaluate and move to dismiss" the attempted murder count. *Ibid.* The prosecutor agreed that that was correct. *Ibid.*

The court then followed the procedures set forth in Federal Rule of Criminal Procedure 11 and determined that petitioner was entering his pleas of guilty voluntarily, knowingly, and intelligently. At the conclusion of the plea proceeding, the district court accepted petitioner's guilty pleas and scheduled a sentencing hearing. J.A. 26.

3. At the sentencing hearing, the district court calculated petitioner's presumptive sentencing range on the aggravated assault conviction to be 51 to 63 months in prison and imposed a sentence of 63 months' imprisonment. J.A. 82. The court's calculation was based on a total offense level of 23 and a criminal history category of II under the Sentencing Guidelines. J.A. 58. The court reached the offense level of 23 by starting with a base offense level of 20 for attempted murder (Guideline 2A2.1(a) (1989)) and adding three points because the victims were federal law enforcement officers (Guideline 3A1.2(a)).[1] J.A. 58. The court also sentenced petitioner to a mandatory, consecutive term of five years' imprisonment for using a firearm in the commission of a crime of violence. *Ibid.*; see 18 U.S.C. 924(c); Sentencing Guideline 2K2.4.

In deciding to apply the attempted murder Guideline, the court relied on Sentencing Guideline 1B1.2. That provision states that the sentencing court must apply the Guideline "most applicable to the offense of conviction," provided, however, that where a guilty plea or plea of *nolo contendere* "contain[s] a stipulation that specifically establishes a more serious offense than the offense of conviction," the court must apply the Guideline "most applicable to the stipulated offense." Although the court noted that petitioner had not formally stipulated to the offense of attempted murder, J.A. 77, the court explained that the facts "as set forth and acknowledged at the guilty plea proceeding * * * added up, in my judgment, to the—to a higher offense, and so therefore, I'm compelled to

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[1] Section 2A2.1 of the Guidelines was revised effective November 1, 1990 to provide a higher base offense level. See Sentencing Guidelines, App. C, Amendment 311 (1990).

find an offense level twenty," *ibid.* In the alternative, the district court said that it would depart upward and impose the same sentence even if petitioner were later found not to have stipulated to attempted murder. *Ibid.*

Petitioner's counsel argued that the proviso to Sentencing Guideline 1B1.2 did not apply because petitioner did not stipulate to a more serious offense, but only entered "a plea, like every other plea, where we acknowledge the statement of fact, said, that's what happened." J.A. 64. If petitioner had been sentenced under the Guideline for aggravated assault, his adjusted offense level would have been 18 points (the sum of the base offense level of 15 for aggravated assault under Sentencing Guideline 2A2.2(a), and three points because the victims were federal law enforcement officers under Sentencing Guideline 3A1.2 (a)). By that calculation, the presumptive sentence on the aggravated assault conviction would have been 30 to 37 months' imprisonment.[2]

After the district court imposed sentence, the government moved to dismiss the attempted murder count. J.A. 79.

4. The court of appeals affirmed. J.A. 86-101. It held that the district court properly applied the Guideline for attempted murder in accordance with Sen-

[2] The adjusted base levels under both the aggravated assault Guideline and the attempted murder Guideline did not take into account the 5 level enhancement for discharging a firearm (see Guidelines 2A2.1(b)(2)(A), and 2A2.2(b)(2)(A)), because petitioner was separately charged with the offense of using a firearm in connection with a crime of violence, 18 U.S.C. 924(c), and the Guidelines provide that the weapons-related enhancements do not apply when the defendant has also been convicted under Section 924(c). See Guideline 2K2.4, Application Note 2.

tencing Guideline 1B1.2. It reasoned that a "stipulation" within the meaning of Guideline 1B1.2 is not limited to a formal written stipulation, but includes as well "an agreement as to the facts that specifically establishes a more serious offense than the offense of conviction." J.A. 98; see *id.* at 87. The court found that petitioner's agreement with the government's proffer of facts constituted such a stipulation, *id.* at 98-99, and that the stipulated facts, which were not in dispute, "clearly support the district court's finding of attempted murder," *id.* at 98, 99. In light of its conclusion, the court of appeals did not reach the district court's alternative holding that petitioner's sentence could be upheld as an upward departure. *Id.* at 99.[3]

Judge Sprouse dissented with respect to the interpretation of Guideline 1B1.2. J.A. 100-101. On the facts of this case, he would have held that peti-

[3] On two other sentencing matters raised on appeal, the court of appeals sustained the district court's addition of three points to petitioner's offense level because his victims were law enforcement officers, J.A. 99-100, and reversed the district court's determination that petitioner's mental status prevented the court from awarding him a two-point credit for acceptance of responsibility, *id.* at 89-94. Neither ruling is challenged in this Court.

On remand, the district court determined that petitioner was entitled to the two-point reduction for acceptance of responsibility and imposed a term of 51 months' imprisonment on the aggravated assault conviction. J.A. 103-104. That reduction decreased petitioner's Guideline range to between 41 and 51 months' imprisonment. If petitioner had been found not to have stipulated to attempted murder, the two-point reduction for acceptance of responsibility would have reduced petitioner's total offense level to 16, and his Guidelines sentencing range to between 24 and 30 months' imprisonment.

tioner did not stipulate to the commission of the offense of attempted murder. *Id.* at 101.[4]

SUMMARY OF ARGUMENT

Sentencing Guideline 1B1.2 provides that when a defendant pleads guilty to an offense but stipulates to the commision of a more serious offense, the court must look to the Guideline for the more serious offense in selecting the appropriate sentence. The question in this case is whether petitioner's agreement to the government's factual proffer at his plea hearing is a stipulation within the meaning of Guideline 1B1.2.

A. Petitioner, who entered a plea of guilty to assault, agreed to facts establishing all the elements of attempted murder. The government stated that it could prove, if the case went to trial, that petitioner shot at four deputy United States marshals, knowing them to be marshals, and that he told the deputies he was trying to kill them. After correcting two minor aspects of the government's statement, petitioner and his counsel agreed that the factual proffer was accurate.

B. An agreement to facts establishing a particular offense is a "stipulation" within the meaning of

[4] Other than the court of appeals below, no other circuit court has determined whether a stipulation for purposes of Guideline 1B1.2 includes a defendant's agreement to the government's factual proffer at the plea hearing. The Fifth Circuit has suggested that a stipulation need not be part of a plea bargain, *United States* v. *Strong*, 891 F.2d 82, 85 (1989) (dictum), while the Second Circuit has voiced the contrary view, *United States* v. *McCall*, 915 F.2d 811, 816 n.4 (1990) (dictum). The Fifth Circuit has also suggested, again in dictum, that a stipulation must be "formal." *United States* v. *Warters*, 885 F.2d 1266, 1273 n.5 (1989).

Guideline 1B1.2. In both lay and legal parlance the term "stipulation" is regarded as synonymous with "agreement," particularly an agreement between attorneys in litigation. Application Note 1 to Guideline 1B1.2 supports this usage; it explains that "[i]n cases where the elements of an offense more serious than the offense of conviction are established by the plea," the calculation of the Guidelines sentence should "reflect the seriousness of the defendant's actual conduct."

C. Petitioner's policy argument—that defining "stipulation" as "agreement" for purposes of Guideline 1B1.2 would be unfair to defendants—ignores the situation of defendants before the Guidelines were promulgated. Under traditional sentencing practice, defendants knew little more than the minimum and maximum sentences authorized by statute. In addition, sentencing courts historically took into account the defendant's real offense in selecting the sentence. With the advent of the Guidelines, defendants are better able to inform themselves, before they decide to plead guilty, of the sentence they are likely to receive. And defendants may protect themselves from unfavorable factual stipulations simply by refusing to agree to the government's version of the facts. What defendants may not do, and what petitioner seeks to do here, is agree to facts establishing all the elements of an offense, while insisting that no "stipulation" has been made and that the court therefore may not sentence the defendant on the basis of conduct he has admitted committing.

ARGUMENT

Petitioner's Agreement To The Government's Statement Of Facts Constitutes A "Stipulation" Under Sentencing Guideline 1B1.2

After a valid conviction, "the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him"—that is, within the range permitted by the statute under which the defendant was convicted. *McMillan* v. *Pennsylvania*, 477 U.S. 79, 92 n.8 (1986) (quoting *Meachum* v. *Fano*, 427 U.S. 215, 224 (1976)). In deciding upon the appropriate sentence within that range, "[s]entencing courts necessarily consider the circumstances of an offense in selecting the appropriate punishment," and this Court has "consistently approved sentencing schemes that mandate consideration of facts related to the crime." *McMillan*, 477 U.S. at 92; cf. *Williams* v. *New York*, 337 U.S. 241, 247 (1949); *United States* v. *Grayson*, 438 U.S. 41, 50 (1978); *United States* v. *Tucker*, 404 U.S. 443, 446 (1972). Under traditional sentencing practice, a trial court could sentence a defendant according to his "real offense", even if that offense was more serious than the offense of conviction, as long as the sentence was within the range permitted by statute.[5] See, *e.g.*, *United States* v. *Castellanos*, 904

[5] Available evidence suggests that criminal sentencing decisions already are based heavily upon actual offense behavior as distinguished from the formal offense of conviction. Empirical studies of judicial sentencing indicate that in many jurisdictions prosecutorial decisions to reduce pending charges appear to have little or no impact on the sentence ultimately imposed. Efforts to study the same phenomenon by interviewing and other nonstatistical techniques confirm the impression that many judges currently disregard charge-reduction agreements and treat the defendant much the same as if he or she had been convicted on the initial charges.

Schulhofer, *Due Process of Sentencing*, 128 U. Pa. L. Rev. 733, 757 (1980); see M. Tonry & J. Coffee, *Enforcing Sentencing Guidelines: Plea Bargaining and Review Mechanisms*, in *The Sentencing Commission and Its Guidelines* 142, 153 (A. von Hirsch, K. Knapp & M. Tonry 1987) ("The term 'real-offense sentencing' is new, but the practice is not.").

F.2d 1490, 1494-1497 (11th Cir. 1990); *United States* v. *Alston*, 895 F.2d 1362, 1372 (11th Cir. 1990); *United States* v. *White*, 888 F.2d 490, 496 (7th Cir. 1989); *United States* v. *Scroggins*, 880 F.2d 1204, 1212-1214 (11th Cir. 1989), cert. denied, 110 S. Ct. 1816 (1990).

The Sentencing Commission "initially sought to adopt a real offense system," but found no practicable way to embody such a system in a set of guidelines. United States Sentencing Commission, *Guidelines Manual*, ch. 1, Pt. A, ¶ 4(a), at 1.4-1.5 (1990).[6] Instead of requiring "pure" real offense sentencing, the Sentencing Guidelines generally require that a defendant be sentenced in accordance with the "guideline section * * * most applicable to the offense of conviction," Guideline 1B1.2, and then provide for adjustments to account for specific features of the defendant's conduct. But the general rule is inapplicable if there is a "conviction by a plea of guilty or *nolo contendere* containing a stipulation that specifi-

[6] The Commission "found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for speedy sentencing process given the potential existence of hosts of adjudicated 'real harm' facts in many typical cases." *Guidelines Manual*, ch. 1, Pt. A, ¶ 4(a), at 1.5.

cally establishes a more serious offense than the offense of conviction." In that event, Guideline 1B1.2 dictates that the defendant is to be sentenced in accordance with the "offense guideline * * * most applicable to the stipulated offense." *Ibid.*

A. Petitioner Agreed To Facts Establishing The Offense Of Attempted Murder

The statement of facts to which petitioner agreed established that he committed the offense of attempted murder. Section 1114 of Title 18 of the United States Code provides that "[w]hoever * * * attempts to kill any * * * deputy marshal * * * engaged in or on account of the performance of his official duties" is guilty of attempted murder. At the plea proceeding, petitioner admitted that the government's statement of facts was correct in all material respects. J.A. 19. The government's statement reflected that petitioner shot at the deputy marshals, that he admitted knowing they were United States marshals, and that he told the deputies he was trying to kill them because he "did not want to go back" to St. Elizabeth's Hospital. *Id.* at 17-18. As the court of appeals held, *id.* at 97, 99, the district court was correct in concluding that the facts set forth by the government and acknowledged by petitioner at the guilty plea proceeding established all the elements of attempted murder.[7]

[7] Contrary to petitioner's suggestion at the plea hearing, J.A. 22, the offense of attempted murder does not require proof that petitioner intended to murder a particular deputy marshal. An intentional act in callous and wanton disregard of the consequences to the marshals' lives—such as shooting through a doorway at chest and head level—is sufficient under 18 U.S.C. 1114. Cf. *United States* v. *Shaw*, 701 F.2d 367, 392-394 & n.20 (5th Cir. 1981), cert. denied, 465 U.S. 1067 (1984).

B. An Agreement To Facts Establishing A Particular Offense Is A "Stipulation" Within The Meaning Of Guideline 1B1.2

The proviso to Sentencing Guideline 1B1.2 requires the district court to base its sentence on the defendant's actual conduct, rather than the offense of conviction, whenever the case involves a guilty plea in which the defendant has made a "stipulation that specifically establishes a more serious offense than the offense of conviction." We agree with the court of appeals, J.A. 98, that a "stipulation" within the meaning of Guideline 1B1.2 includes an agreement to facts establishing a particular offense.

1. The court of appeals' definition of a "stipulation" as an "agreement" accords with the common definition of the term, as reflected in a variety of dictionaries, both general and legal. The term "stipulation" is typically regarded as synonymous with "agreement," particularly "an agreement between attorneys respecting the conduct of legal proceedings," *Webster's Third New International Dictionary of the English Language Unabridged* 2245 (1986), or "an agreement between attorneys that concerns business before a court," 9 *The Guide to American Law* 395 (1984). The leading law dictionary likewise defines "stipulation" in a manner consistent with the court of appeals' definition in this case:

> ["Stipulation" is] [t]he name given to any agreement made by the attorneys engaged on opposite sides of a cause (especially if in writing), regulating any matter incidental to the proceedings or trial, which falls within their jurisdiction. Voluntary agreement between op-

> posing counsel concerning disposition of some relevant point so as to obviate need for proof or to narrow range of litigable issues. An agreement, admission or confession made in a judicial proceeding by the parties thereto or their attorneys.

Black's Law Dictionary 1415 (6th ed. 1990) (citations omitted).

Defining "stipulation" as "agreement" furthers the purpose of the proviso to Guideline 1B1.2. Application Note 1 to Guideline 1B1.2 explains that the proviso

> has a practical basis. In cases where the elements of an offense more serious than the offense of conviction are established by the plea, it may unduly complicate the sentencing process if the applicable guideline does not reflect the seriousness of the defendant's actual conduct. Without this exception, the court would be forced to use an artificial guideline and then depart from it to the degree the court found necessary based upon the more serious conduct established by the plea. The probation officer would first be required to calculate the guideline for the offense of conviction. * * * Then, the probation officer might need to calculate the * * * guideline [for the more serious offense established by the stipulated facts] in determining the appropriate degree of departure in a case in which the defendant pled guilty to [one offense] but admitted committing [a more serious offense]. This cumbersome, artificial procedure is avoided by using the exception rule in guilty or *nolo contendere* plea cases where it is applicable.

Because petitioner agreed with the statement of facts proffered by the government, which established all the elements of attempted murder, his plea of guilty "contain[ed] a stipulation that specifically establishe[d] a more serious offense than the offense of conviction." Sentencing Guideline 1B1.2. It was therefore proper for the district court to sentence him under Guideline 2A2.1, the Guideline applicable to the offense of attempted murder.

If petitioner were subject to sentencing as if he had committed only an aggravated assault, the sentence would not reflect the conduct that both parties agreed occurred in this case. In that event, in order to reach an appropriate sentence within the Guidelines, the government would have to pursue the attempted murder charge and force scarce judicial resources to be devoted to trying a case in which the facts are undisputed. To require such a course would serve no value and would render guilty pleas a less useful way of resolving criminal cases.

In the alternative, the sentencing court could depart upward from the range of sentences indicated by the Guideline for aggravated assault. See *United States* v. *Strong*, 891 F.2d 82, 85 (5th Cir. 1989); *United States* v. *Garza*, 884 F.2d 181, 184 (5th Cir. 1989); *United States* v. *Guerrero*, 863 F.2d 245, 250 (2d Cir. 1988). The "reasonable" departure in that circumstance, see 18 U.S.C. 3742(e), would, of course, be that which would approximate the sentence that would have applied if the defendant had been convicted for the real offense (subject, of course, to the statutory maximum sentence for the offense of conviction). See *United States* v. *Perez*, 915 F.2d 947, 949 (5th Cir. 1990); *United States* v. *Zamarripa*, 905 F.2d 337, 342 (10th Cir. 1990); *United States* v. *Kim*, 896 F.2d 678, 684-685 (2d Cir. 1990).

The departure route would bring the court to the same sentence, but it would involve an unnecessarily

circuitous journey to that end. The Application Note to Guideline 1B1.2 indicates that the proviso was designed to avoid just such a pointless exercise. Because the parties agreed on the facts that specifically established all the elements of attempted murder, the Sentencing Guidelines authorized the district court to apply the Guideline for attempted murder and to impose the sentence it did without the need for a trial on the attempted murder charge and without the need for a departure from the applicable Guidelines range.[8]

2. Petitioner argues that the term "stipulation" in Guideline 1B1.2 should be read restrictively in several respects. None of petitioner's proposed limitations on the meaning of that term is supported by the language of the Guidelines or the policies the Guidelines were designed to promote.

a. Petitioner's principal submission is that a "stipulation" within the meaning of Guideline 1B1.2 must be embodied in a plea bargain agreement. See Pet. Br. 10, 17-21, 23. His main textual basis for that argument is the use of the word "containing" in the proviso to Guideline 1B1.2 ("in the case of a

[8] The district court stated that if it was incorrect in its calculation of petitioner's Guidelines sentencing range, it would depart upward and impose the same sentence. We believe that the district court's sentence can be sustained on that ground if this Court disagrees with our submission here. Because the court of appeals did not address the departure issue, however, we believe that if the Court reverses on the "stipulation" issue, it should remand the case to the court of appeals for further consideration of the sentence, including the question whether the district court was correct in concluding that a departure would be appropriate in this case.

plea of guilty or *nolo contendere* containing a stipulation that specifically establishes a more serious offense than the offense of conviction"). The proviso, however, does not refer to a "plea bargain," or a "plea agreement." Instead, the word "containing" modifies the term "plea." While the phrasing of that proviso may not be ideal,[9] it is clear enough that the effect of the term "containing" is simply to require that the stipulation be made in connection with the plea of guilty or *nolo contendere*, rather than at some other time, such as at sentencing.[10]

Petitioner also seeks some support from the use of the term "specifically" in Guideline 1B1.2 ("a stipulation that *specifically* establishes a more serious offense than the offense of conviction"). The use of that term, however, merely indicates that the agreement must be intended to establish the defendant's actual conduct, rather than to serve some other purpose; it does not support petitioner's claim

[9] The Sentencing Commission has recently requested comments as to whether Guideline 1B1.2 should be amended to provide expressly that such a stipulation must be part of a formal plea agreement. 56 Fed. Reg. 1891 (1991).

[10] The decision in *United States* v. *Guerrero*, 863 F.2d 245 (2d Cir. 1988), illustrates that distinction. In that case, the defendant entered a stipulation of facts after the plea proceedings to aid in the sentencing decision. The stipulation was not entered in connection with the plea proceedings. For that reason, the court held that the stipulated facts could be used only to determine the relevant conduct under Guideline 1B1.3 for the offense of conviction, and could not be used to support the court's selection of a different offense Guideline pursuant to Guideline 1B1.2. 863 F.2d at 248.

that a stipulation must be the product of a negotiated plea bargain.

To require that the stipulation be part of a plea bargain agreement would defeat the primary goal of the Sentencing Reform Act by creating "unwarranted disparities among defendants with similar records who have been found guilty of similar conduct." 28 U.S.C. 991(b)(1)(B). For example, if petitioner's tacit understanding with the prosecutor, J.A. 13, had been memorialized in a formal plea bargain, the applicability of the attempted murder Guideline would be beyond dispute. Under petitioner's restrictive definition of "stipulation," differences among sentences for two otherwise similarly situated defendants would depend on insignificant procedural differences in their plea proceedings rather than substantive differences in their criminal conduct. See *United States* v. *Strong*, 891 F.2d at 85 ("In any event, the same sentencing result is appropriate whenever the actual conduct of the defendant is more serious than that reflected by the guideline result.").

As this case illustrates, not all guilty or *nolo contendere* pleas are the product of bargained agreements. In fact, it is in cases in which the government's case is especially strong and the material facts not subject to dispute that a plea of guilty is most likely not to be the product of a bargained agreement. In that setting, the defendant may, as in this case, plead guilty to a lesser offense in the hope that the government will dismiss charges on the greater offense, but without a formal commitment from the government. If the government is satisfied with the sentence on the lesser charge, the defendant obtains the benefit of a lower maximum statutory penalty—not a major victory, perhaps, but a factor

of some value to a party with very little bargaining power. In this case, for example, the defendant obtained a maximum statutory penalty of 10 years' imprisonment by pleading guilty to assault, rather than the 20 years' imprisonment he could have faced if he had been convicted of attempted murder. See 18 U.S.C. 111, 1114.

While the defendant in a case such as this one may obtain the benefit of a lower maximum statutory penalty by pleading guilty to a lesser charge and inducing the government not to pursue the greater charge, there is no reason to apply the Sentencing Guidelines as if the true facts of the case were restricted to the offense of conviction. Where the defendant agrees to facts that establish all the elements of the greater offense, there is no reason not to apply the Guideline that most accurately reflects the defendant's true conduct. It would not further the policies of the Sentencing Guidelines or the Sentencing Reform Act to impose sentence based on a defendant's actual conduct only if his agreement to the elements of that offense is in writing or is embodied in a plea bargain agreement.

In response to these arguments from the language and the policies of the Guidelines, petitioner answers with references to a congressional report, a law review article, and a policy statement found in a separate chapter of the Sentencing Guidelines.

First, petitioner refers to a House of Representatives report that is cited in the commentary to Guideline 1B1.2. He contends that the citation of that report supports his view that a "stipulation" within the meaning of that Guideline must be part of a plea agreement. Pet. 22-23 (citing H.R. Rep. No. 1017, 98th Cong., 2d Sess. 99 (1984)).

The report in question discusses the concept of stipulations to greater offenses in a manner that is generally supportive of petitioner's position. Significantly, however, the House bill to which the report pertains was not enacted. Rather, Congress passed the Senate bill, which was quite different from the House version. See *Mistretta* v. *United States*, 488 U.S. 361, 366 n.3 (1989). In particular, the House bill required the Guidelines to employ the offense of conviction rather than the real offense, except where the real offense conduct was stipulated as a part of the plea agreement. See proposed 18 U.S.C. 3792 (a)(1), as set forth in H.R. Rep. No. 1017, *supra*, at 190; proposed 18 U.S.C. 3525(c)(1), as set forth in H.R. Rep. No. 1017, *supra*, at 175; H.R. Rep. No. 1017, *supra*, at 97-99. Under the House bill, any other information regarding the real offense could be considered as grounds for departure, but could not be used to calculate the offense level. See proposed 18 U.S.C. 3525(b)(5) as set forth in H.R. Rep. No. 1017, *supra*, at 175. By contrast, the Senate bill, which was enacted, requires the Sentencing Commission and the sentencing judge to consider the nature and circumstances of the offense in determining the appropriate sentence: the enacted bill does not specify when or whether real offense conduct should be covered directly in Guidelines or only as bases for departures from the Guidelines. See 28 U.S.C. 994 (c)(2); 18 U.S.C. 3553(a). The language from the House report on which petitioner relies therefore has no bearing on the proper construction of the statute that was enacted or the Guidelines that were promulgated under the authority of that statute.

The citation of the House report in the commentary to Guideline 1B1.2 obviously was not intended

to adopt by implication the entire approach of the rejected House bill; instead, the reference appears to have been intended simply to illustrate how the Guideline would apply to a "greater offense" stipulation that is part of a plea agreement. Nothing in the citation to the House report, or in the commentary generally, suggests that a stipulation *must* be part of a plea agreement.

As further support for his contention that a "stipulation" under Guideline 1B1.2 must be part of a negotiated plea agreement, petitioner relies on an excerpt from a law review article written by the Chairman and the General Counsel of the Sentencing Commission. In the article, they state:

> The purpose of this exception [the proviso to Guideline 1B1.2] is to achieve a closer conformity between the charged offense and the real offense conduct in those limited situations in which a defendant admits to conduct that satisfies the elements of a more serious offense than the offense to which he pleads. It is not enough that the defendant simply admit at sentencing to more serious criminal activity than the charged offense proscribes; rather, a negotiated quid pro quo as part of a plea of guilty or nolo contendere is contemplated.

Wilkins & Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C.L. Rev. 495, 501 (1990) (footnotes omitted). That excerpt cannot fairly be read to mean that an agreement is not a "stipulation," within the meaning of Guideline 1B1.2, unless it was a "negotiated quid pro quo." In their discussion, the authors refer to two polar situations: an admission at a sentencing hearing, which is not a stipulation in connection with

a plea of guilty,[11] and a plea bargain with a negotiated stipulation. Given the high incidence of negotiated guilty pleas, the proviso to Guideline 1B1.2 will ordinarily operate in the realm of plea bargains. It is therefore natural that the authors would refer to that case as the typical example of what is contemplated by a stipulation under Guideline 1B1.2. The authors' description of how the proviso operates in the typical case, however, should not be read as limiting stipulations to plea bargains that involve prosecutorial concessions and not making provision for the occasional case in which a guilty plea is entered without any bargained concession from the government.

Finally, petitioner cites the policy statement in Section 6B1.4 of the Sentencing Guidelines for the proposition that the Sentencing Commission contemplated the use of stipulations "only as part of a negotiated plea agreement." Pet. Br. 18. The purpose of that policy statement, however, is to prevent the parties to a plea bargain from stipulating to "misleading or non-existent facts" in order to achieve a sentence inconsistent with the Guidelines. Guideline 6B1.4, comment. Because the policy statement concerns plea bargaining, it simply does not speak to whether stipulations may be entered outside the context of a plea bargain; it certainly does not suggest that an agreement entered into outside the context of a plea bargain cannot qualify as a "stipulation" within the meaning of Guideline 1B1.2.

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[11] To illustrate this situation, the authors cite a case, *United States* v. *Guerrero*, 863 F.2d 245 (2d Cir. 1988), rejecting a stipulation entered into at the sentencing hearing. 41 S.C.L. Rev. at 504 n.41; see note 10, *supra* (discussing *Guerrero*).

b. Petitioner next relies on the same policy statement in Section 6B1.4 of the Guidelines as support for the second of his proposed limitations on the term "stipulation" in Guideline 1B1.2—that an agreement does not qualify as a stipulation unless it is in writing. See Pet. Br. 18; see also Pet. 9-10. Section 6B1.4(a) provides that "[a] plea agreement may be accompanied by a written stipulation of facts relevant to sentencing." The policy statement, however, is permissive; no rule requires stipulations to be in writing in plea bargains or elsewhere. The fact that Section 6B1.4 expressly refers to written stipulations, while Guideline 1B1.2(a) does not contain any express requirement that stipulations be in writing, suggests that the Sentencing Commission was reluctant to foreswear the use of oral stipulations and chose instead to leave the formality of stipulations to local rule. See Guidelines § 6B1.4(c) p.s.; cf. *Rodriguez* v. *United States*, 480 U.S. 522, 525 (1987) (per curiam) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (use of a term in one part of a statute but not in another suggests that the omission was deliberate).[12]

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[12] It would make little sense for the Sentencing Commission to bar the court from using at sentencing facts to which the parties agree simply because the agreement was not reduced to writing. Courts have frequently treated informal agreements between counsel on the record as stipulations, even when court rules have required that such matters should be stipulated in writing. See, *e.g.*, *Moody* v. *Pepsi-Cola Metropolitan Bottling Co., Inc.*, 915 F.2d 201, 206 (6th Cir. 1990); *United States* v. *Fisher*, 912 F.2d 728, 732 (4th Cir. 1990); *United States* v. *Alvarado Garcia*, 781 F.2d 422, 427 (5th Cir. 1986); *Twohy* v. *First Nat'l Bank*, 758 F.2d 1185, 1189-1190 (7th Cir. 1985).

c. As the last of his proposed limitations on the meaning of the term "stipulation" in Guideline 1B1.2, petitioner suggests that a stipulation must be an agreement to an offense, not simply an agreement to facts that establish the elements of an offense. Pet. Br. 19-20. Guideline 1B1.2, however, does not by its terms require an explicit agreement that a particular offense has been committed; instead, it gives effect to stipulations that "establish" such an offense, a clear indication that a factual stipulation would be sufficient. Moreover, Application Note 1 to Guideline 1B1.2 discusses the application of the proviso to a stipulation that "establishes *facts*" and "admits the *elements*" of an offense, contradicting the notion that the defendant must stipulate to an offense *eo nomine*. Not surprisingly, in light of the language of the Guideline and the Application Note, the courts of appeals have understood the proviso to apply to purely factual stipulations. See, *e.g.*, *United States* v. *Bos*, 917 F.2d 1178, 1180-1181 (9th Cir. 1990); *United States* v. *Perez*, 915 F.2d 947, 949 n.3 (5th Cir. 1990); *United States* v. *Pologruto*, 914 F.2d 67, 69 (5th Cir. 1990); *United States* v. *Beard*, 913 F.2d 193, 198 (5th Cir. 1990); *United States* v. *White*, 912 F.2d 754, 755-756 (5th Cir. 1990); *United States* v. *Collar*, 904 F.2d 441, 442 (8th Cir. 1990); *United States* v. *Roberts*, 898 F.2d 1465, 1466-1467, 1469 (10th Cir. 1990); *United States* v. *Martin*, 893 F.2d 73, 75 (5th Cir. 1990); *United States* v. *Garza*, 884 F.2d at 183-184.

In sum, while petitioner suggests several possible restrictive interpretations of the term "stipulation," none of them finds convincing support in the language, structure, or purposes of Guideline 1B1.2. In particular, petitioner offers nothing to rebut the ordinary understanding of a "stipulation" as an "agreement," and he fails to show how his restrictive definition would adequately serve the purpose of the proviso to Guideline 1B1.2, which is to ensure that, in cases disposed of by pleas of guilty or *nolo contendere*, the court will engage in "real offense" sentencing if the parties can agree on the defendant's "real" criminal conduct.

C. Defining "Stipulation" To Mean "Agreement" For Purposes Of Guideline 1B1.2 Will Not Result In Unfairness To Defendants

Contrary to petitioner's suggestion, there is nothing novel or unfair about allowing a district court to sentence a defendant who enters a guilty plea based on his actual conduct. To begin with, such a defendant is in no worse position than his counterpart before the adoption of the Sentencing Guidelines. Under traditional sentencing practice, a defendant knew the minimum and maximum sentences permitted by statute, and little more. As we noted above, a sentencing court under the traditional system could, and often would, take into account the defendant's actual conduct in imposing a sentence within the statutory limits, and that practice has never been held to be unfair or unlawful. See *McMillan* v. *Pennsylvania*, 477 U.S. at 92; pp. 12-13 & note 5, *supra*.

There is likewise no unfairness in subjecting a defendant under the Sentencing Guidelines to a sentence based on conduct that he has admitted committing, even if he pleads guilty to a less serious offense. With the adoption of the Sentencing Guidelines, a defendant has a better idea of the range of sentences to which he is exposed, and if he wishes to avoid having a base offense level greater than the offense level of the crime to which he pleads guilty, he may simply

refrain from agreeing that he has engaged in conduct that constitutes a greater offense. Of course, if the defendant takes that approach, the government may charge him with the greater offense and pursue that charge, or attempt to prove that conduct at the sentencing hearing so that the court may depart upward from the Guidelines range in sentencing. Moreover, by adamantly refusing to acknowledge the full range of his criminal conduct, the defendant may forfeit the opportunity of receiving credit for acceptance of responsibility under Guideline 3E1.1, which can result in a reduction of approximately 20 to 30 percent of the defendant's sentence. Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 29 (1988). Accordingly, a defendant who refuses to acknowledge his conduct is likely to be no better off (and may be significantly worse off) than the defendant who is forthcoming, even though the forthcoming defendant may be subject to sentencing under a Guideline that is harsher than the one for the offense of conviction. Regardless of which course he chooses, however, the well-counseled defendant will know what he faces.

To be sure, some uncertainty regarding a defendant's potential sentence is inevitable, because Guidelines sentencing ranges are only presumptive. In petioner's case, for example, the district court could still depart upward, as petitioner's counsel acknowledged that it could, J.A. 22, 45, 64. In recognition of the inevitable uncertainty even under the Sentencing Guidelines, Federal Rule of Criminal Procedure 11 (c)(1) was amended in 1989 to require advice to the defendant that the court "may depart from those guidelines under some circumstances." The Advisory Committee's Note observes that "[n]o advice is likely

to serve as a complete protection against post-plea claims of ignorance or confusion." With that advice, and with a proper recognition of the risks and advantages that inhere in entering agreements with regard to the conduct at issue in the case, a defendant can make an even more informed judgment about whether to enter a plea of guilty than he could have done before the Sentencing Guidelines. The disposition of the question presented in this case will not make that judgment any less informed; it will simply avoid the creation of formalistic distinctions between some agreements that are deemed "stipulations" for purposes of Guideline 1B1.2 and some that are not.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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